

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARREN VINCENT FORD,  <div style="text-align: right;">Petitioner,</div>	}	No. C 07-3930 JF (PR)  ORDER OF DISMISSAL
vs.	}	
SUSAN HUBBARD, Warden  <div style="text-align: right;">Respondent.</div>	}	

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Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed two previous habeas actions with this Court, in case no. C 99-21059 JF (PR) and C 03-2534 JF (PR), challenging the same conviction and sentence raised in the instant petition. In case no. C 99-21059 JF (PR), the Court dismissed the petition as untimely pursuant to 28 U.S.C. § 2244(d) on September 29, 2000. In case no. C 03-2534 JF (PR), the Court dismissed Petitioner's second habeas petition, as a second or successive petition pursuant to 28 U.S.C. § 2244(b)(1). Similarly, the Court will DISMISS the instant petition as a second or successive petition pursuant to 28 U.S.C. § 2244(b).

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1 A district court must dismiss claims presented in a second or successive habeas  
2 petition challenging the same conviction and sentence unless the claims presented in the  
3 previous petition were denied for failure to exhaust. See 28 U.S.C. § 2244(b)(1); Babbitt  
4 v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must  
5 dismiss any new claims raised in a successive petition unless the petitioner received an  
6 order from the court of appeals authorizing the district court to consider the petition.

7 Section 2244 does not apply where the first petition was dismissed without  
8 prejudice for failure to exhaust state remedies. See Slack v. McDaniel, 529 U.S. 473,  
9 485-86 (2000); Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998); Anthony v.  
10 Cambra, 236 F.3d 568, 572 (9th Cir. 2000); In re Turner, 101 F.3d 1323, 1323 (9th Cir.  
11 1996). Section 2244 does apply where the first petition was denied on the grounds of  
12 procedural default. Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir.2005) (denial of  
13 petition on procedural default grounds constitutes disposition on merits). A petitioner  
14 who did not appeal the dismissal of his earlier petition cannot attempt to evade the rules  
15 governing successive petitions by attacking the validity of the earlier dismissal in the  
16 second proceeding, unless he was prevented from properly litigating the dismissal of the  
17 earlier petition in the first instance. Id. at 1054-55 (refusing to consider whether earlier  
18 petition should have been dismissed for failure to exhaust, as opposed to for procedural  
19 default, where petitioner failed to appeal the erroneous ruling).

20 Here, the instant petition challenges the same conviction and sentence as the  
21 previous petition, which was dismissed by the Court as untimely. Although a dismissal  
22 based upon the statute of limitations as set forth under § 2244(d) does not include an  
23 examination of the merits of the substantive claims, “such a dismissal is considered an  
24 adjudication of the merits for purposes of determining whether a subsequent petition is  
25 successive under AEDPA.” Reyes v. Vaughn, 276 F. Supp. 2d 1027, 1029 (C.D. Cal.  
26 2003) citing to Cate v. Ayers, 2001 WL 1729214, at \*4 (E.D. Cal. 2001) and United  
27 States v. Casas, 2001 WL 1002511 at \*2 (N.D. Ill. 2001).

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1 Petitioner has not presented an order from the Ninth Circuit Court of Appeals authorizing  
2 this Court to consider any new claims. Accordingly, this Court must dismiss the instant  
3 petition in its entirety. See 28 U.S.C. § 2244(b)(3)(A).

4 **CONCLUSION**

5 The instant habeas petition is DISMISSED as a second and successive petition.  
6 The Clerk shall terminate any pending motions and close the file.

7 IT IS SO ORDERED.

8 DATED: 8/27/07

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JEREMY FOGEL  
United States District Judge

1 A copy of this order was mailed to the following:

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3 Darren Vincent Ford  
4 K-17549  
5 California Medical Facility  
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